DATE: September 8, 1996

CASE NO.: 95-STA-38

In the Matter of

STEVEN L. JACKSON

Complainant

v.

PROTEIN EXPRESS

Respondent

APPEARANCES:

Melinda O'Dell-Stasek, Esq.
500 Market Tower
10 West Market Street
Indianapolis, Indiana
For the Complainant

Jane G. Morrison, Esq.
136 N. Delaware Street, Suite 300
P.O. Box 627
Indianapolis, Indiana
For the Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), 49 U.S.C. Section 2305. The case arose in this office following the issuance of a determination by the Regional Administrator, Occupational Safety and Health Administration that there was not sufficient evidence to believe that the Respondent violated the STAA.

Pursuant to Section 31105 of the STAA, complainant, Steven Jackson, filed a complaint with the Secretary of Labor, alleging that respondent, Protein Express, fired him for complaining about bad brakes on a truck which he regularly drove. The respondent

denied the allegation. After the initial investigation by the U.S. Department of Labor, it was determined that there was not sufficient evidence to believe that the respondent violated the STAA. The Regional Administrator concluded that the complainant had abandoned his job and had not been terminated. Complainant requested a formal hearing following issuance of the adverse findings which was held on January 24, and January 25, 1996 before the undersigned Administrative Law Judge. The Findings of Fact and Conclusions of Law which follow are based upon a careful analysis of the evidentiary record[1] made at the hearing and the arguments of the parties.

ISSUES

1. Whether Steven L. Jackson was discharged as a result of having been engaged in protected activity under the provisions of the STAA;

2. A computation of back wages; and

3. Whether the complainant's attorney is entitled to be compensated for time devoted to the preparation of the sanctions materials.

STIPULATIONS

The parties agree that the provisions of Section 2305(b) of the STAA apply to this complaint. It is also undisputed that Protein Express is engaged in interstate and intrastate trucking operations and maintains a place of business in Bunker Hill, Indiana. In the regular course of business, Respondent's employees operate commercial motor vehicles in interstate commerce principally to transport cargo. Respondent has been, at all times material, a person as defined in Section 31101(4) of the STAA. 49 U.S.C. 2301(4). At all times material herein, Steven Jackson was an employee within the meaning of the STAA, in that he was required to drive commercial motor vehicles having a gross vehicle weight rating of 10,000 or more pounds used on the highways in interstate commerce to transport cargo. Also, Jackson was an employee within the meaning of the STAA in that he was employed by a commercial motor carrier and, in the course of his employment, directly affected commercial motor carrier safety. 49 U.S.C. 2301(4).

FINDINGS OF FACT

[1] In this decision, "ALJX" refers to Administrative Law Judge Exhibits, "JX" refers to Joint Exhibits, and "Tr." refers to the transcript of the hearing.

Protein Express is in the business of hauling raw milk. The business consists of collecting and hauling milk from local farmers and transporting that product to a local dairy for processing. The company used three Mack trucks for hauling the milk. They were 1976, 1981 and 1985 vehicles. The trucks were serviced by local garages. The record contains a variety of invoices from an Ogle's Garage and also a Merritt's Truck and Auto Repair which demonstrate a history of repair work to the trucks. (JX 2, 3 and 12-20) Protein is owned by Timothy D. Grove.

Steven L. Jackson was initially employed by Protein Express on or about September 1, 1994. (Tr. 21) He had been trained as a commercial truck driver and has a commercial driving license. His duties were to daily drive a tanker full of milk from Bunker Hill, Indiana to a processor in Richmond, Indiana and there to unload the milk, wash the tanker and return the vehicle to the garage in Bunker Hill. The truck he drove to perform these duties was a 1985 Mack. (Tr. 21) Mr. Jackson thought that the truck was in poor condition, as it often needed repairs. (Tr. 22).

On January 13, 1995, Mr. Jackson was driving the 1985 Mack truck which was fully loaded with milk. He testified that he was having trouble with the brakes. Complainant believed that the brakes were malfunctioning, so he drove the truck to a local mechanic for evaluation. All brakes on the tractor and trailer were inspected and adjusted. (JX 2, 3) Receipts from Merritt's Truck and Auto Repair in Kokomo, Indiana show that the rear axle of the trailer needed brakes, though the front axle was satisfactory. (JX 2) The tractor needed brake shoes and drums on both drive axles and also needed cam bushings. (JX 3) Mr. Jackson testified that the mechanic who inspected and adjusted the brakes advised him not to drive the truck. However, Jackson testified that the truck was loaded with fifty-eight thousand gallons of milk and that it was necessary for him to take the product to the dairy. Therefore, he completed the run. Following the brake inspection and adjustment, he drove from Kokomo, Indiana to Cambridge City, Indiana where the milk was unloaded. Mr. Jackson then returned by way of back country highways which cut about twenty miles off of the return route to Bunker Hill and saved approximately thirty minutes of driving time.

Following the completion of the run, the complainant telephoned Mr. Grove. His testimony concerning that conversation was as follows:

> The general nature of that call was that I was calling him to tell him that his truck didn't have brakes on it and that I had stopped at the shop and I had tickets written up for work orders on the truck to be done and that he needed to get a hold of Perry to let him know that that truck needs to be fixed or that he needs to get a truck that is safe to operate for me to drive or I'm

> not driving. And that was pretty much the end of that statement. (Tr. 40)

Mr. Jackson testified that he did not refuse to drive any safe vehicle nor did he tell Mr. Grove that he had quit. In response to the statements by the complainant, Mr. Grove represented that he would get in contact with Perry Shelton who would attempt to resolve the situation. Mr. Shelton is another driver for Protein.

At the time of that conversation, Mr. Grove was preparing to leave on a week long vacation. He did not speak directly with Mr. Jackson from the time he left on vacation until he returned on January 21, 1995. (Tr. 139, 235-236)

The next day, January 14, 1995, Perry Shelton, an employee of Protein Express, telephoned Mr. Jackson. (Tr. 41). Mr. Shelton asked Mr. Jackson whether he was going to drive the truck that day. (Tr. 202). Mr. Jackson refused to drive the truck and did not ask whether another truck was available. (Tr. 255). According to Mr. Jackson, Mr. Shelton fired him from Protein Express during that conversation, or told him that he was finished driving for Mr. Grove. (Tr. 42, 243). However, Mr. Shelton testified that he did not fire the complainant, as he has no authority to hire, fire or take any other action against employees. (Tr. 197, 202). Mr. Shelton believed that the complainant quit. He had called the complainant at the request of Mr. Grove to see if he would be working so that a replacement driver could be obtained if he was not going to drive the route. Mr. Jackson's belongings remained in the truck, and Mr. Shelton offered to drop the complainant's belongings at a farm owned by a friend of Mr. Jackson. (Tr. 203) However, Mr. Jackson declined that offer, and told Mr. Shelton to leave his belongings in place. (Tr. 205)

Shelton also drives a milk tanker for Protein and earns $75.00 to $100.00 per day. His compensation was the same as the compensation of the other drivers depending upon whether they drove the day or night shift. (Tr. 226) Mr. Shelton testified that he was not in a management position. He was not paid anything in addition to the fixed amount per day. At the time of this incident on January 13, 1995, he was not the senior of the four drivers employed by Protein. At the time of the hearing in this case, he was the senior driver. He has never had discussions with Mr. Grove about looking after company problems or truck problems in Grove's absence. Mr. Shelton testified that if the other drivers would see him before they saw Mr. Grove, that they would take their problems to him for some unknown reason. He inspected only the brakes on his own vehicle. On January 13, 1995, Mr. Shelton was aware that Mr. Grove was leaving town but he did not know where he was going nor did he have any discussion with Mr. Grove concerning management responsibilities in Grove's absence. When Mr. Grove is unavailable, drivers do contact Mr. Shelton with their problems, (Tr. 216) but he is not their supervisor.

After the complainant told Shelton that he would not drive the truck, Mr. Shelton drove the truck that same day and had no trouble braking. (Tr. 206) He did check the brakes before he drove the truck and found them to be satisfactory. (Tr. 209) Mr. Shelton drove the truck every day between January 14, 1995 and January 23, 1995 when the brakes were repaired on the trailer. (Tr. 233) The repair work was done ten days following the incident. During that entire period, Mr. Shelton experienced no problems with the brakes. (Tr. 207) He drove the equipment on his regular runs for seven days a week. (Tr. 233) Mr. Shelton testified that there were always backup trucks available to drive in the event the regular trucks experienced mechanical problems. (Tr. 210)

The record contains a variety of repair invoices evidencing repair work to either a truck or a trailer of Protein. (JX 12-20) The complainant drove a 1985 red Mack truck in performing his hauling duties. Although some are not specifically identified, I assume that all of the repair invoices relate to repairs made to this truck or the milk tanker trailer which the complainant was hauling. The invoices demonstrate that on December 30, 1994, a spare tire was installed and a door was repaired. (JX 17) On that date, the odometer reading of the vehicle was 796,959 miles. On January 19, 1995, other repair work was performed and the invoice for that work shows an odometer reading of 804,495 miles. (JX 16) Still further, on February 8, 1995, clutch and transmission work was performed at a time when the odometer of the vehicle registered 811,867. (JX 15) These invoices demonstrate that this vehicle was in continuous use in that between December 30, 1994 and February 8, 1995, it had been driven 14,908 miles. That mileage was accumulated over an approximate thirty-nine day period. Thus, the truck which was of 1985 vintage also had a considerable amount of mileage and was driven on the average of 382 miles per day during this period. The record shows that the drivers had the authority to take both the trucks and the trailers to garages in the area for repair as the repair was needed.

Mr. Jackson’s wife, Kristina Jackson, and sister, Joy Voyles, both testified at the hearing. Both witnesses were present when the complainant received the telephone call from Mr. Shelton on January 14, 1995. (Tr. 91, 94) Both witnesses found the complainant to be upset during and after the conversation, and neither witness heard the complainant say that he quit his job. (Tr. 93, 95)

According to Tim Grove, the 1985 Mack truck was safe to drive on January 14, 1995, even though a work order had been completed detailing the repairs which needed to be made on the brakes. (Tr. 116) Mr. Grove never received a call from his mechanic warning that the truck should not be driven. (Tr. 117) Although complainant was aware of the availability of a backup truck, he did not request to drive it, and Mr. Grove never offered it. (Tr. 120, 145)

There is evidence in the record that Jackson has received a written warning for speeding in a commercial motor vehicle. (Tr. 222) However, Mr. Jackson denied that contention. Complainant testified that he had never received a speeding ticket or a warning for speeding while driving a commercial motor vehicle. (Tr. 250) He did acknowledge driving the loaded truck eighty miles per hour downhill because of the weight and surge associated with the load. (Tr. 249) The record shows that Mr. Shelton gave complainant a written warning to "drive slow" due to the weight of the vehicle. (JX 5) Jackson had previously told Shelton that he would drive the truck 75 miles per hour if he wanted to. (Tr. 202)

Richard Raney, a friend of the complainant, testified that Perry Shelton informed him that Mr. Jackson quit his job with Protein. This conversation took place while Mr. Raney was working at Patterson's milk barn. Mr. Shelton approached him there, and Mr. Shelton brought some of the complainant's clothing with him. (Tr. 75-79) Scott Stewart, Jackson's brother-in-law, has worked as a truck driver since 1989 and is familiar with commercial motor vehicles. He is familiar with the truck the complainant drove at Protein Express and understood that complainant had difficulty with the brakes. Mr. Stewart has not driven milk tanker trucks. (Tr. 80-85) Montie Harris, complainant's cousin, has driven a tractor-trailer in the past. He rode in the truck with complainant and noticed that the brakes appeared to be bad and that the complainant had trouble stopping. However, Mr. Stewart never drove the truck himself. (Tr. 87-90)

The complainant did not speak with Mr. Grove again until several months later, even though he made several attempts to contact him. The complainant never heard directly from Mr. Grove that he was terminated from his job. However, in the spring of 1995, Mr. Grove contacted the complainant and asked if he wanted to return to work at Protein. Mr. Jackson refused because he felt he had been mistreated by Grove. (Tr. 45) The complainant has continued to look for trucking jobs, but has not found one which meets his standards. Those standards are being able to leave in the morning and return in the afternoon to be home with his wife and kids. (Tr. 46) Mr. Jackson has worked for a temporary service at $4.50 per hour, but that was insufficient to feed his family. (Tr. 47) His wife went to work as a Nursing Assistant, a job in which she earns $7.90 during the week and $8.40 on the weekends. (Tr. 97)

Mr. Jackson usually earned $75.00 per day driving a truck for Protein Express, but did not drive every day. He occasionally earned $100.00 per day, for certain routes. Complainant alleges that his damages total $42,600.00 which includes attorney fees. Included in this total is complainant's loss of pay at the rate of $525.00 to $700.00 per week for 48 weeks, or ranging from $25,200.00 to $33,600.00, the $5,000.00 cost of an automobile

financed at 21% interest for work purposes, and attorney fees of $4,000.00.

I find all of the witnesses who testified to be credible excepting portions of the testimony of Steven L. Jackson. I observed Mr. Jackson carefully and I found his testimony to have been embellished in part and partially false as it related to his telephone conversation with Perry Shelton on the day following the incident. Both Grove and Shelton denied telling Jackson that he was fired. Jackson testified that he considered Mr. Shelton to have been his supervisor yet the record shows that both Jackson and Shelton earn the same amount of money and operated the same equipment. I believe Shelton's testimony that he was not a company manager and that he did not tell Jackson that he was fired. The claimant testified that the mechanic at Merritts who inspected the brakes and made the adjustments to the braking system on January 13, 1996, told him not to drive the truck. Yet the invoices from that date show only that the brakes were "inspected and adjusted" and the invoice shows no emergency as to the condition of the brakes. The invoices give no indication that the truck and trailer were in an unsafe condition and should not be driven. The record shows that following the milk delivery on January 13 to Cambridge City, Indiana, that complainant drove the truck back to Bunker Hill without apparent incident. Jackson also testified that he had never received a warning ticket while driving a commercial vehicle. Yet his testimony was that at times, he drove the truck on occasion at eighty miles per hour while going downhill, and that he had told Mr. Shelton that he would drive the equipment as fast as he wants. (Tr. 199) That response does not seem to indicate that Jackson believed that Shelton was in a supervisory position. On another occasion, Shelton gave Mr. Jackson written warning concerning how fast he ought to be driving the equipment. (Tr. 201, JX 5) In weighing all of these considerations and apparent inconsistencies, I choose to give the testimony of Steven Jackson little weight.

CONCLUSIONS OF LAW

The purpose of Section 405 of the STAA is to protect employees from retaliatory discharge for refusal to operate a motor vehicle not in compliance with applicable state and federal safety regulations. Brock v. Roadway Express, Inc., 481 U.S. 252, 10 S.Ct. 1740, 96 L.Ed. 2d 239 (1987).

Mr. Jackson bears the initial burden of establishing a prima facie case of retaliatory discharge, which raises an inference that protected activity was the likely reason for the adverse action. Once successful, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its employment decision. If the respondent rebuts the inference of retaliation, the complainant then bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. Moon v. Transport

Drivers, Inc., 836 F.2d 226 (6th Cir. 1987); Kahn v. U.S. Sec'y of Labor, 64 F.3d 271 (7th Cir. 1995). The ultimate burden of proof remains at all times with the complainant to demonstrate that illegal discrimination actually motivated the employer to take an adverse employment action against the complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993).

To establish a prima facie case of retaliatory discharge, the Complainant must prove that he engaged in protected activity, that he was the subject of adverse employment action, that his employer was aware of his protected activity, and that there was a causal link between his protected activity and the adverse action of his employer. Id.

Once these elements are established, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason for its employment decision." Id.

Section 2305 provides:

> (a) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because such employee (or any person acting pursuant to the request of the employee) has filed any complaint or instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.
>
> (b) No person shall discharge, discipline or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

Protected Activity and Adverse Employment Activity

Under subsection (a) of Section 2305, protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management. Mr. Jackson's complaints about the safety of the truck and the brakes is clearly protected activity. Such a complaint is protected even though it is only internal within the company and not to any government agency. See Kahn v. U.S. Sec'y of Labor, 64 F.3d 271 (7th Cir. 1995). Mr. Shelton was not proven to be a member of management and, therefore, conversation with him about safety concerns I do not deem to be protected. Refusing to drive a vehicle which one considers to be unsafe is also protected activity, if that apprehension is one which a reasonable person would experience. Any adverse action following a complaint would be unlawful.

Federal Motor Carrier Safety Regulations are applicable to all employers, employees, and commercial motor vehicles which transport property or passengers, including the parties involved in this case. 49 C.F.R. 390.3(a). The safety regulations state that every commercial vehicle shall be equipped with brakes acting on all wheels. 49 C.F.R. 393.42(a). The regulations also require that all brakes with which a motor vehicle is equipped must at all times be capable of operating. 49 C.F.R. 393.48(a).

The brakes in the 1985 Mack truck clearly needed to be repaired as of January 23, 1995. However, the evidence does not show that the brakes did not act on all wheels nor does it show that the brakes were not capable of operating properly following their inspection and adjustment on January 13, 1995. Mr. Shelton and the other drivers drove the truck with no problem from that date until the brakes were actually repaired on January 23. Mr. Jackson's apprehension about driving the truck may have been reasonable or it may have been contrived. Mr. Shelton was not apprehensive, and drove the truck without incident until it was repaired. Other drivers also used the equipment during this interim period and there is no evidence of complaint from them. It seems evident that a motor vehicle with approximately 800,000 miles of service and which was in use for almost 400 miles per day would require regular servicing. That fact alone does not establish that the equipment was unsafe on January 12, 1995.

There may be circumstances in which a driver's refusal to drive would compel the conclusion that the driver's perception of an unsafe condition was reasonable, even if a subsequent inspection reveals no defect. Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994). However, although the brakes of the 1985 Mack truck were in need of repair on January 13, they were not proven to be inoperative or unsafe. Mr. Shelton and other drivers were able to drive the truck with no problems for ten full days following Mr. Jackson's complaint.

Even if Mr. Jackson's apprehension about driving the truck was reasonable, credible evidence that Jackson was fired after he raised safety concerns about the Mack truck does not exist. The only evidence that Mr. Jackson was fired is his own testimony which has been discounted. Both Grove and Shelton denied telling Jackson that he was terminated. Although the claimant's testimony, standing alone, can satisfy the adverse action element of a prima facie case if it is not contradicted by other evidence, I do not find that to be the case here. See Ass't Sec'y & Brown v. Besco Steel Supply, 93-STA-30 (Sec'y January 24, 1995).

Jackson's wife and sister testified that he was upset during and after the telephone conversation with Mr. Shelton. However, they did not actually take part in that conversation and could not testify as to what was said. Mr. Shelton's credible testimony is directly contradictory of the complainant's testimony. Mr. Shelton testified that he did not attempt to fire Jackson because he had no authority to act in that regard. He merely inquired as to Jackson's intentions. Also, the testimony of complainant's friend, Richard Raney, corroborates the finding that Mr. Jackson was not fired. According to Mr. Raney, Mr. Shelton told him that the complainant quit. That testimony is consistent with Shelton's testimony.

Steven Jackson told Mr. Grove that he would not drive the equipment and subsequently he simply did not show up for work and was replaced. Mr. Jackson made no further effort to continue employment at Protein Express and, therefore, abandoned his position. Job abandonment is not an activity protected by § 31105 of the STAA. Since no adverse employment action occurred, Mr. Jackson cannot establish a prima facie case. Therefore, I recommend that his complaint be dismissed. The disposition of the complaint by way of recommended dismissal negates the need to consider the issue of back wages.

ATTORNEY FEES AND COSTS

Melinda O'Dell-Stasek, counsel for complainant, requested as part of a Motion for Default Judgment and also orally at the hearing that attorney fee costs for the time spent attempting to obtain compliance with both petitioner's discovery requests and the Order of the Administrative Law Judge be paid by the Respondent as a penalty for its willful noncompliance. Counsel cites Rule 37 of the Federal Rules of Civil Procedure in support of her motion.

Jane Morrison, counsel for respondent, objects to the request, arguing that prior to filing her Motion to Compel or Amended Motion to Compel, Petitioner's Counsel made no attempt to contact the respondent or respondent's counsel to resolve the matter. Respondent's counsel asserts now, and has previously explained, that the failure to meet the above-mentioned deadlines was due solely to clerical errors and not to willful noncompliance.

Complainant's counsel refers to Rule 37 of the Federal Rules of Civil Procedure in support of her request for attorney fees as costs. The regulations for STAA cases at 29 C.F.R. Part 1978 specifically adopt the rules found at 29 C.F.R. Part 18 in the conduct of these cases. The Secretary has concluded that the Department has not elected to assert any inherent authority to impose costs in a whistleblower proceeding. Billings v. Tennessee Valley Authority, Case No. 89-ERA-16-25, and 90-ERA-2-8-18 (Sec'y, July 29, 1992); White v. "Q" Trucking Company, et al, 93-STA-28 (Sec'y, December 2, 1994). Therefore, the complainant's request for attorney fees associated with the sanctions motion are hereby denied.

ORDER

IT IS HEREBY RECOMMENDED that the complaint of Steven L. Jackson against Protein Express be dismissed. IT IS FURTHER RECOMMENDED that the Request for Attorney Fees as costs associated with the sanctions request also be denied.

RUDOLF L. JANSEN
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).